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Sup Ct*

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 46

STATE OF WISCONSIN AND ELMER E. BARLOW,
AS COMMISSIONER OF TAXATION OF THE
STATE OF WISCONSIN, PETITIONERS,

vs.

J. C. PENNEY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN

PETITION FOR CERTIORARI FILED APRIL 19, 1940.

CERTIORARI GRANTED MAY 20, 1940.

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RASKOPF, A. J.—

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STATE OF WISCONSIN
IN SUPREME COURT

AUGUST TERM, 1939.

No. 96

J. C. PENNEY COMPANY, a foreign corporation,

Appellant,

vs.

WISCONSIN TAX COMMISSION,

Respondent.

CASE

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Record.

This is an appeal from a judgment rendered in the Circuit Court for Dane County, Wisconsin the Honorable August C. Hoppmann presiding, on the 10th day of June, 1939, which said judgment confirmed an order of the Wisconsin Tax Commission dated July 21st, 1938 which levied an assessment upon the appellant under the so-called Wisconsin Privilege Dividend Tax law in the amount of \$23,586.79.

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Record.

1-110 Record of Proceedings Before the Wisconsin
Tax Commission, (included in subsequent portion
of printed case).

111-126 NOTICE OF APPEAL TO THE CIR-
CUIT COURT FOR DANE COUNTY,
WISCONSIN, FROM DECISION AND
ORDER OF THE WISCONSIN TAX
COMMISSION.

(Title omitted.)

111 To the Wisconsin Tax Commission,
Madison, Wisconsin:

PLEASE TAKE NOTICE that J. C. PEN-
NEY COMPANY hereby appeals to the Circuit
Court for Dane County, Wisconsin, from the
whole of the order and decision of the Wisconsin
Tax Commission which was served by registered
mail upon the appellant on July 25th, 1938 and
which bears date of the 21st day of July, 1938, a
copy of which said order and decision is hereto
attached, marked Exhibit No. 1 and is hereby re-
ferred to and made a part of this notice.

OBJECTIONS TO ORDER AND DECI-
SION AND TO ASSESSMENT MADE.

The objections to the said order and decision
and to the assessment therein made, are stated
as follows:

- (1) That said assessment is void and of no
effect whatsoever by reason of the fact that the

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purported law on which the said assessment was based, as applied by the Wisconsin Tax Commission to the J. C. Penney Company, is unconstitutional under both the Constitution of the United States of America and the Constitution of the State of Wisconsin, and particularly under the 112. Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1, Constitution of the State of Wisconsin; Article I, Section 8, Constitution of the United States of America; Article I, Section 10, Constitution of the United States of America; Article I, Section 8, Constitution of the State of Wisconsin; Article I, Section 12, Constitution of the State of Wisconsin; Article IV, Section 1, Constitution of the United States of America.

**STATEMENT OF FACTS UPON WHICH
APPELLANT BELIES AS CONSTITUT-
ING BASIS OF THIS APPEAL.**

As appears from the record herein made before the Wisconsin Tax Commission, the J. C. Penney Company is a Delaware corporation having its statutory office at Wilmington, Delaware. It is engaged in the business of operating a nationwide chain of approximately fifteen hundred retail department stores; its principal executive office is in New York City, New York. It is qualified to do business in the State of Wisconsin but has no executive office of any kind located within the State of Wisconsin. During the year 1934 it operated forty-seven

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stores in this state. In 1935 and 1936 it operated forty-eight stores in Wisconsin. During the year 1934 J. C. Penney Company had a total net income computed on a Wisconsin tax basis of \$16,022,607.00 and in 1935 a total net income of \$15,223,478.00 derived from business transacted in all forty-eight states. Under the formula set forth in the Wisconsin income tax law \$562,331.00 of the above net income for 1934, and \$587,001.00 of the above net income for 1935, was allocable to Wisconsin as income derived from business transacted in that state, and J. C. Penney Company paid a Wisconsin income tax for the years 1934 and 1935 based upon these figures.

On December 31, 1935 J. C. Penney Company declared a dividend of \$2.25 per share, making 113 total dividend payments of \$5,555,214.00

In 1936 J. C. Penney Company declared and paid the following dividends:

Date Paid	Amount Per share	Total Amount Paid to Stockholders
3/31/36	\$.75	\$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

By a notice of additional assessment dated July 16, 1937, the Wisconsin State Tax Commission assessed a privilege dividend tax in the principal amount of \$22,696.37, together with interest and penalties of \$1,495.20, making a total of \$24,191.57 against J. C. Penney Company.

This assessment was made pursuant to Chapter 505 of the Wisconsin Laws of 1935 effective September 26, 1935, as amended by Chapter 552 of the Laws of 1935 effective October 9, 1935, Chapter 233 of the Laws of 1937 effective June 15, 1937, and Chapter 309 of the Laws of 1937 effective July 1, 1937. The Wisconsin Tax Commission, using the income tax figures set forth above, ascertained that the percentage of the 1934 income allocable to Wisconsin was .35096% and that the percentage of 1935 income so allocable to the State of Wisconsin was .38558%. After multiplying total dividends paid in 1935 by .035096, and total dividends paid in 1936 by .038558, the resulting figures were multiplied by the rate of tax fixed by the State Tax Commission (.025641) and penalties and interest were added, the final figure being the amount of the assessment. Under the decision of the State Tax Commission on July 21, 1938 the rate of tax fixed by the State Tax Commission was reduced from .025641 to .025, reducing the principal amount of the tax assessed to \$22,128.97 and reducing the interest and penalties to \$1,457.82, making a total of \$23,586.79.

The J. C. Penney Company duly filed its application for hearing, and objection to assessment, within the period allowed by law.

The following are certain of the details with
114 respect to J. C. Penney Company's manner of
conducting its operations and disbursing its
funds. The total proceeds from sales of goods

in Wisconsin stores and in stores in all other states are deposited in local banks. From such accounts payments are made for payrolls, rents, advertising and other local expenses. The balance not needed to meet such expenses is transmitted to regional depository banks, from which banks the moneys are transmitted by checks or drafts drawn by the Treasurer's office in New York City, and the money is deposited in New York banks to the general credit of J. C. Penney Company. No one in Wisconsin has any authority to draw upon any moneys deposited in a regional depository bank. The moneys after leaving the local banks completely lose their identity as moneys derived from any particular source. The funds so deposited to the credit of the company in New York are used to pay salaries, general overhead expenses of the New York and other offices, taxes and dividends. Checks are also drawn upon the New York accounts in payment for merchandise purchased from all sources, and shipped to the various stores of the company, including those in Wisconsin. All of the stock books, minute books, and secretary's records of the company are kept within the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that state. All transfers of shares of the company are made in New York by the transfer agent of the company, Chemical Bank and Trust Company. All directors' and stockholders' meetings of J. C. Penney Company are held in the State of New York, and the dividends

involved in this assessment were declared at directors' meetings held at the principal offices of the company at 330 West 34th Street, New York City. The actual payment of such dividends was effected by the executive officers of the company, who caused checks to be drawn upon the accounts of J. C. Penney Company in its New York banks payable to the stockholders of record upon each dividend record date. Such checks were placed in envelopes addressed to each stockholder of record upon each dividend record date at his address, as the same appeared upon the records of the company, and were duly mailed from the Post Office in New York City. All of the books and records of the company used in the payment of such dividends were situated in the State of New York. No act in connection with the payment of the dividends in question was performed within the State of Wisconsin and no act in connection with the receipt of such dividends was performed in Wisconsin, except that certain of the stockholders of the company receive their mail in this state.

Computations, schedules and testimony were introduced at the time of hearing before the Tax Commission which showed that there were 391 stockholders who were residents of the State of Wisconsin as of the date of the payment of the December 31, 1935 dividend, as against a total of 12,385 stockholders. The proofs and testimony further show that with respect to the dividend paid under date of March 31, 1936 there were

393 stockholders residing in Wisconsin as against a total of 12,687 stockholders; that with respect to the dividend paid on June 30, 1936 there were a total of 401 stockholders who were residents of Wisconsin as against a total of 12,927 stockholders; that with respect to the dividend paid on September 30, 1936 there were 405 Wisconsin stockholders out of a total of 13,066 stockholders; that with respect to the dividend paid on December 15, 1936 there were 406 Wisconsin stockholders as against a total of 13,281 stockholders.

The application for hearing and the proofs before the Tax Commission at the hearing further showed in tabulated form as hereinafter more particularly set forth, (1) the total amounts received by Wisconsin residents on the payment of the above dividends, (2) the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (this is calculated by the use of the percentages used by the Tax Commission in reaching its assessment), and (3) the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings, namely:

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Dividend

Date	(1)	(2)	(3)
12/31/35	\$74,965.50 x .035096	\$2,599.40 x .025641	\$66.65
3/31/36	24,814.50 x .038558	956.80 x "	24.53
6/30/36	25,320.00 x "	976.29 x "	25.03
9/30/36	34,097.00 x "	1,314.71 x "	33.71
12/15/36	133,147.25 x "	5,133.89 x "	131.64
		Total	\$281.56

The above figures represent the face amount of tax without penalties or interest. Furthermore, the Tax Commission has conceded that the rate upon which computation should be made upon any dividends that are paid and which are taxable should be a straight $2\frac{1}{2}\%$ rate rather than .025641, so that on the basis of the straight $2\frac{1}{2}\%$ rate the tax without penalties on the amounts received by Wisconsin residents allocable to Wisconsin earnings, on the basis used by the Tax Commission, would be:

Dividend	Date	(1)	(2)	(3)
	12/31/35	\$74,065.50 x .035096	\$2,599.40 x $2\frac{1}{2}\%$	\$64.99
	3/31/36	24,814.50 x .038558	956.80 x "	23.92
	6/30/36	25,320.00 x "	976.29 x "	24.41
	9/30/36	34,097.00 x "	1,314.71 x "	32.87
	12/15/36	133,147.25 x "	5,133.89 x "	128.35
			Total	\$274.54

The J. C. Penney Company at no time deducted any of the alleged taxes from the dividends paid to its stockholders.

The entire balance, amounting to \$21,854.43, of said corrected assessment of \$22,128.97 (without interest or penalties therefor) represents the tax on dividends received outside of Wisconsin by persons residing outside of the State of Wisconsin. Over ninety-six percent of the stockholders of the company owning ninety-eight percent of the stock reside outside of Wisconsin.

Compliance with the statute would require J. C. Penney Company to perform numerous clerical operations in the State of New York each time a dividend is paid. While it is impossible to itemize the cost of such compliance, it is evident that it would require an extra or additional calculation or operation on the part of each employee participating in the determination of the amount of dividends payable to each stockholder of record and in the issuance of the checks therefor, since the calculation and deduction of the tax would necessarily increase the work to that extent.

The proofs before the Commission further show that the dividends in question were specified by the resolutions declaring the same to be paid from the surplus of the company, and that at the end of the calendar year 1934 the J. C. Penney Company had a surplus of \$29,279,543.14, at the end of 1935, a surplus of \$36,072,252.54, and at the end of 1936 a surplus of \$37,095,176.77, which represented accumulated earnings of many years derived from all of the states of the Union. The Wisconsin earnings, and earnings for particular calendar years, were not segregated and had lost their character as earnings long before the dividends herein involved were paid.

The proofs before the Commission further show that under Section 34 of the Delaware Corporation Law, under which J. C. Penney Company is incorporated, the Board of Directors have power to declare and pay dividends upon the shares of capital stock either (a) out of its

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net assets in excess of its capital, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year.

Under date of July 21st, 1938 the Wisconsin 118 Tax Commission rendered its decision, a copy of which is attached hereto and marked Exhibit #1, wherein and whereby it ordered that the additional assessment was properly made and that the same be placed upon the tax roll after the same is recomputed at the straight 2½% rate rather than at the rate originally used by the Commission of .025641, and it is from this decision that the J. C. Penney Company appeals.

ASSIGNMENTS OF ERROR

(1) The Wisconsin Tax Commission erred in deciding and ordering that the assessment and additional assessment in question was properly made, and in ordering that the additional assessment be placed on the tax roll;

(2) The Wisconsin Tax Commission erred in its findings and decision and order that the Wisconsin Privilege Dividend Tax law was constitutional as applied to any of the dividends paid by the J. C. Penney Company which are involved in this appeal;

(3) The Wisconsin Tax Commission erred in any event in determining that the Wisconsin Privilege Dividend Tax law was constitutional

so far as it was applicable to payments of dividends to such of the stockholders as were non-residents of Wisconsin;

(4) The Wisconsin Tax Commission erred in refusing to pass upon the constitutionality of the Wisconsin Privilege Dividend Tax law as applied to the J. C. Penney Company.

PROPOSITIONS OF LAW RELIED
UPON BY THE TAXPAYER IN THIS
APPEAL.

- (a) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, and deprives J. C. Penney Company and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin except the receipt of such dividends as were paid to Wisconsin stockholders. Furthermore, the funds from which said dividends were paid cannot be said to be Wisconsin funds but are general funds of the company deposited in New York banks and de-
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rived from remittances from stores in all of the forty-eight states and general deposits by the New York office of the company.

That the State of Wisconsin further has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the State of Delaware and/or the laws of the State of New York.

That even if said tax might be held to be constitutional from a jurisdictional standpoint, insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the State and/or as to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Constitution of the State of Wisconsin, since it would be a denial of the equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions.

That the tax is on the *payment and receipt* of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists the whole assessment is invalid.

That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session

Laws of 1935, and amendments thereto, under which this tax is assessed, that the Legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the State. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the Legislature would not have passed it in so limited a form. Consequently, the entire law is ineffective notwithstanding the provisions of Section 4 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto.

That even if the tax might be held to be invalid insofar as it levies a tax on dividends paid to and received by Wisconsin residents within the State, it is invalid insofar as it purports to levy a tax on dividends paid and received outside of Wisconsin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin and consequently said State has no jurisdiction to levy an excise tax. That \$23,293.70 of said assessment represents taxes, penalties and interest levied upon the payment of such dividends. This proposition is presented as an alternative and is not to be construed as an admission that the law is valid insofar as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position here taken that the whole tax is invalid.

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(b) That said tax is further unconstitutional under Section I of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, because it is a direct tax upon the J. C. Penney Company stock. The State of Wisconsin has no jurisdiction to tax said stock insofar as it is owned by persons not residing within the State. \$23,293.70 of this assessment, including taxes, penalties and 121 interest, was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

(c) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, and deprives J. C. Penney Company of liberty and property without due process of law in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous other acts within the State of New York. The State of Wisconsin has no jurisdiction to require J. C. Penney Company to do such acts within the State of New York in order to assist it in collecting the tax levied by said section and amendments thereto.

(d) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution, because when declared a dividend becomes a debt of the company. The tax is in effect a direct tax on such debt which has no taxable situs in the State of Wisconsin.

(e) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution, because it attempts to levy a ~~tax~~ upon dividends paid from earnings accumulated before its passage. The annual earnings cannot be apportioned as to time and that therefore the tax is unconstitutional as to 1936 dividends as well as 1935, because it is retroactive and in effect a tax upon accumulated surplus which does not have a taxable situs in the State of Wisconsin.

422 (f) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Wisconsin Constitu-

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tion because it is an excise on the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt. Said exemption is a denial of the equal protection of the laws and unreasonable. Said tax is also not uniform.

(g) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Article I, Section 10 of the Constitution of the United States of America and under Article I, Section 12 of the Wisconsin Constitution, because it impairs the obligation of contracts. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholder received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of Delaware, New York and Wisconsin.

(h) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Article IV, Section 1 of the Constitution of the United States of America, because it fails to give full faith and credit to the laws of New York and Delaware and the corporate charter, by-laws and resolutions of J. C. Penney Company drawn pursuant thereto which give it the right to conduct its business and declare and pay dividends in said States.

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(i) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Article I, Section 8 of the Constitution of the United States of America because it interferes with the power of Congress to regulate commerce among the several States. Said law interferes with the 123 free transmission of corporate funds from State to State.

(j) The assessment is further void because the same was calculated pursuant to the statutory presumption under Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, that the dividends in question were paid from the previous year's income and contained an exact proportionate part of the Wisconsin earnings for such year. Such presumption contained in the law in question is plainly not in accord with the true facts, and has been rebutted by the proof as made, and if not so rebutted, the same is void as arbitrary and unreasonable and unconstitutional under the 14th Amendment of the Constitution of the United States of America and Article 1, Section 1 of the Wisconsin Constitution.

The appellant herein has availed itself of the remedies provided by the Statutes of the State

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of Wisconsin, and particularly Sections 71.12
and 71.14.

J. C. PENNEY COMPANY,
Appellant.

By A. W. Hughes,
Vice-President.

GWINN & PELL of
522 Fifth Avenue,
New York City,
and

ELA, CHRISTIANSON & ELA, of
1 West Main Street,
Madison, Wisconsin,

Its Attorneys.

W. H. Dannat Pell,
Emerson Ela,
G. Burgess Ela,
Of Counsel.

124 In the Matter of the Appeal of)
J. C. PENNEY COMPANY,) Exhibit No. 1
a Corporation)
from an Assessment of Privilege)
Dividend Taxes with respect to)
dividends paid on December 31,)
1935, March 31, 1936, June 30,)
1936, September 30, 1936, and)
December 15, 1936.)

DECISION.

The main issue involved in this appeal is the constitutional validity of the privilege divided

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tax imposed by Chapter 505, Laws of 1935, as amended, upon dividends declared by J. C. Penney Company, a Delaware corporation.

The Tax Commission has in the past refrained from ruling upon the constitutionality of any act of the legislature, and it so rules in this case.

The rate of the tax should be changed in this case from 2.5641% to 2.5%, as was conceded at the hearing on the part of the taxpayer and the income tax division of the Tax Commission.

FINDINGS.

According to an opinion rendered by the Attorney General, the Tax Commission is not supposed to pass upon the constitutionality of any act of the legislature, but if we were at liberty to pass upon the law we would have to find it constitutional and adhere to *State ex rel. Froedert Grain and Malting Company vs. Tax Commission*, 221 Wis. 225. The rate should be changed to 2.5%, and the tax should be recomputed.

DECISION.

IT IS, THEREFORE, ORDERED BY THE TAX COMMISSION That the assessment was properly made.

IT IS FURTHER ORDERED That the additional assessment, after being recomputed at 125 the 2.5% rate, be placed on the tax roll and that

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proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin this 21st day of July, 1938.

WISCONSIN TAX COMMISSION,
W. J. Conway,
Henry A. Gunderson,
Herbert L. Mount,
Commissioners.

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127-128 ANSWER OF WISCONSIN TAX COMMISSION ON APPEAL TO CIRCUIT COURT.

(Title omitted.)

For answer to the objections raised by the Appellant in the above-entitled action, the Respondent Wisconsin Tax Commission, appearing by the Attorney General and Harold H. Persons, Assistant Attorney General, say that the assignments of error are without support in the law, or in the facts as shown by the record made up of copies of all the documents, papers, evidence statements and exhibits on file in the matter and all the testimony taken down, returned into court pursuant to sec. 71.16, Wisconsin Statutes.

ORLAND S. LOOMIS,
Attorney General,
HAROLD H. PERSONS,
Assistant Attorney General,
Attorneys for Respondent.

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- 129 *ADMISSION OF SERVICE* of Brief of Ap-
pellant on Appeal to Circuit Court.

(Omitted.)
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- 1-109 Record Before Wisconsin Tax Commis-
sion Returned to Circuit Court on Ap-
peal.

- 1-2 *RETURN* of Wisconsin Tax Commission on
Appeal.

(Omitted.)

- 3-10 *INDEX TO RECORD* Before Wisconsin Tax
Commission.

(Omitted.)

- 11-46 *TRANSCRIPT OF TESTIMONY BE-
FORE WISCONSIN TAX COMMIS-
SION.*

- 11 "Papers marked by the reporter Ex-
hibits 1, 2, 3 and 4, AJK."

"Mr. Best: If the Commission please,
this is a hearing held pursuant to the application
of J. C. Penney Company, a Delaware corporation,
from an assessment of privilege dividend taxes with respect to
dividends paid on December 31, 1935, on
March 31, June 30, September 30, and
December 15, 1936.

"The reporter has marked as Exhibit 1
the stipulation of facts entered into between
the parties.

"He has marked as Exhibit 2 the document consisting of several sheets, the first sheet being a copy of a letter dated March 2nd, 1937, from Wisconsin Tax Commission to J. C. Penney Company; the next sheet being a letter dated March 16th, 1937, from J. C. Penney Company to Mr. L. F. Dugan, auditor, Wisconsin Tax Commission, together with the next three sheets; being enclosures which accompanied that letter, the first one being headed 'Wisconsin separate accounting data of J. C. Penney Company'; the second sheet of the enclosure being headed, 'J. C. Penney Company, profit and loss account for the year ended December 31, 1935'; and the third sheet of the enclosure being headed 'J. C. Penney Company, a Delaware corporation, balance sheet as at December 31, 1934.'

"The next sheet of the exhibit is a copy of a letter dated March 31, 1937, from the Wisconsin Tax Commission to J. C. Penney Company; the next sheet of the exhibit is a schedule which was attached to the letter dated March 31, 1937, showing the computation of privilege dividend taxes and the last sheet of the exhibit a copy of a letter dated July 16th, 1937 from Wisconsin Tax Commission to J. C. Penney Company, attached to which is a return receipt for registered mail.

"The reporter has marked as Exhibit 3 two sheets, the first of which is the original of a telegram from Gwinn and Pell, to R. F. Kamm, auditor, Wisconsin Tax Commission, dated July 31 — presumed to be July 31, 1937; the second sheet of which is a copy of a telegram from Wisconsin Tax Commission to Gwinn and Pell, dated July 31, 1937.

"The reporter has marked as Exhibit 4 document consisting of two sheets, the first of which is a copy of a letter from Wisconsin Tax Commission to Gwinn and Pell dated September 4, 1937, acknowledging receipt of a protest and request for hearing in this matter; the second sheet of which is a copy of a letter from Wisconsin Tax Commission to J. C. Penney Company, dated March 31, 1938, notifying the taxpayer of the date of this hearing.

"We offer Exhibits 1, 2, 3 and 4 in evidence. Is there any objection?

(Objection reserved but later withdrawn.)

"Mr. Best: The privilege dividend tax involved in this matter was originally computed in the letter dated March 31, 1937, at the rate of 2.5641 per cent and in accordance with the Commission's recent ruling in this matter, the Income Tax Division now concedes that the tax rate to be applied to the dividends should be 2.5 per cent.

"Mr. Ela: Just a minute, that is the revised computation on that basis.

"Mr. Best: We have made no revised computation but in the event the Commission affirms the assessment, we concede it should be computed at 2.5 per cent.

"Mr. Ela: Wouldn't it be well to agree that the actual computation on that basis shall be incorporated as part of this record? I think it might be desirable.

"Mr. Best: Well, I see no need.

"Mr. Ela: That is surely a matter—

"Commissioner Conway: If there is any question about it, you are entitled to that.

"Mr. Pell: If I may supplement Mr. Ela's statement, the only reason for having it in, if we go up to the court, it would be well for the court to have before it the exact amount involved.

"Mr. Best: That would be done in this manner: If the Commission affirms the assessment and directs the tax to be computed at 2.5 per cent, it will direct that assessment as computed be entered on the tax roll or if there already is one, that it conform to that. It will form a part of the record together with that decision.

"Mr. Pell: That will be satisfactory, as long as we follow the record; that would be the only point.

"Commissioner Conway: That will be the understanding.

"Mr. Best: The exhibits which we have offered show the basis of the computation of this tax and the parties have stipulated as to certain facts. The only issue involved is the constitutional validity of the tax in question.

"That is all that we have at this time.

"Mr. Ela: We will call Mr. Raskopf."

A. J. RASKOPF, witness, called on behalf of appellant:

Direct Examination.

My name is A. J. Raskopf and I reside in Garden City, Nassau County, New York. I am Secretary of the J. C. Penney Company and have been continuously since December 29, 1931. As such officer I have charge of the minute book of the corporation. I also have charge of the stock book of the corporation and of the records having to do with the declaration and payment of dividends. As Secretary I attend all of the meetings of the directors except when I am on vacation. I take and keep the minutes of the meetings of the stockholders and of the directors which I attend. I have charge of the tax department of the J. C. Penney Company and I am familiar with the general methods employed in conducting the business of this corporation. The company was incorporated under the laws of Delaware on December 15, 1924. The company has a statutory office at 100 West 10th Street, Wilmington, Delaware, as required by the laws of the state. We

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- actually maintain our name on an office there and maintain some one there who is the agent for the company at that address. The principal office for the transaction of business is located at 330 West 34th Street, New York City, and was located there during the years 1934, 1935 and 1936. J. C. Penney Company is qualified to do business as a foreign corporation both in the state of New York and state of Wisconsin. During the years 1935 and 1936 J. C. Penney Company was required to pay a franchise tax as a domestic corporation in the state of Delaware and did make payment of that tax. During that same period J. C. Penney Company as a foreign corporation paid franchise taxes to the state of New York. We paid income taxes in the state of Wisconsin for the years 1934, 1935 and 1936 and filed returns upon the forms required by the tax authorities of Wisconsin. So far as I know those tax returns disclose the true facts pertaining to the income of this corporation, and contained a full and complete disclosure as required by the laws of Wisconsin. We also made a report of the payment of dividends involved in this tax matter to the state of Wisconsin, but took the position that we were not liable for the tax and have never paid it. In those reports however we disclosed the true facts regarding the dividends.

In 1934, 1935 and 1936 and presently the J. C. Penney Company was and is engaged in the business of operating retail department stores in all of the forty-eight states of the Union. We have

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about fifteen hundred stores and the number changes slightly from time to time. We are able to give figures as of certain definite dates with respect to the number of stores. I have a table of the number of stores operated by our company in each of the forty-eight states as of the end of the years 1934, 1935 and 1936.

- 19 (Exhibit 5 marked.) Exhibit 5 is a document reflecting the number of stockholders according to states as of December 20, 1935, March 20, 1936, June 20, 1936, September 18, 1936 and December 4, 1936, and is a true and correct statement of the facts therein reflected. (Exhibit 5 offered in evidence.) The dates reflected in Exhibit 5 are dates of record for the payment of the dividends in question. Exhibit 5 is a complete tabulation showing the number of stockholders in each state as of the date of record for payment of the dividends.
- 20 (Exhibit 6 marked.) Exhibit 6 has been compiled under my instructions and accurately sets forth the facts regarding the number of stores operated in the various states as of the end of 1934, 1935 and 1936. (Exhibit 6 offered in evidence.) At the end of 1934 we had 1474 stores, of which 47 stores were in Wisconsin; at the end of 1935 we had a total of 1481 stores, of which 48 were in Wisconsin; at the end of 1936 we had a total of 1496 stores, of which 48 were in Wisconsin. (Exhibit 7 marked.)
- 21 Exhibit 7 is an accurate list of locations of our stores in Wisconsin as of the end of 1936.

In the operation of the J. C. Penney Company we have a uniform system or method of handling moneys received by the different stores. Every store in Wisconsin, and the same is true of every store in every other state, has an account with a local bank in the town in which the store is located. All the money received from the sale of goods is deposited by the local manager of the store in this bank. From this bank account payments are made by the store manager for local pay rolls, rents, advertising and other local expenses only. The balance of the money is transmitted by the store manager to a regional bank maintained by the company in a large city near the store. These regional banks are purely conduits for the transmission of these funds to the treasurer's office in New York City, where the money is deposited to the general credit of the J. C. Penney Company in New York banks. The 22 moneys after leaving the local banks completely lose their identity as moneys derived from any particular source. In 1934 and 1935 stores in Wisconsin transmitted their funds to the regional bank at Chicago, Illinois, and in 1936 to the regional bank at Milwaukee, Wisconsin, from which banks the funds were transmitted to New York. The moneys so deposited to the credit of the company in the New York banks are used to pay salaries, general overhead expenses of New York and other offices, taxes and dividends, and checks are likewise drawn on these New York City bank accounts in payment of merchandise purchased from all sources and shipped to all

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- stores of the company including those of Wisconsin. The local store manager has nothing whatsoever to do with the money that is realized from sale of merchandise in a local store except to pay the purely local expense items and to transmit the money to the regional bank. After it gets to the regional bank there is nobody in Wisconsin that has any thing whatsoever to do with it. In getting the money out of the Milwaukee bank checks or drafts are drawn in New York for the transfer of the funds from the Milwaukee bank to whatever bank we desire that it go to, and no one in Wisconsin has any thing to do with that.
- 23

The stock books, minute books and secretary's records of the company are kept within the State of New York except as required by the Delaware statutes. A duplicate stock ledger is maintained at the office of the Corporation Trust Company, J. C. Penney Company's statutory agent in Delaware. All transfers of shares of stock in the company are made in New York by the Chemical Bank & Trust Company, 165 Broadway, New York City, which company is the transfer agent of the J. C. Penney Company capital stock. All stockholders' meetings of the company are held in the state of New York. There has never been held any stockholders' meetings in the state of Wisconsin. All directors' meetings are held in the state of New York. There have never been, within my knowledge, any directors' meetings held within the state of Wisconsin. The divi-

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dends which were declared during the years 1935 and 1936 were by resolution of the board of 24 directors. Each one was represented by a specific resolution fixing the rate of the dividend and the date of closing the books for dividend purposes. All dividends during the years 1935 and 1936 were declared at meetings of board of directors of the company held at 330 West 34th Street, New York City, and as stated, all the records in connection with the declaration of payments were physically located in New York City. On December 21, 1935 the dividend declared was at a rate of \$2.25 a share and the total paid to shareholders was \$5,555,214.00; on March 31, 1936 and June 30, 1936 the rate was 75c a share and on each of those dates \$1,851,738.00 is the total amount paid to shareholders; on September 30, 1936 the amount of dividends per share was \$1.00 and the total amount paid to shareholders was \$2,468,984.00 and on December 15, 1936 the dividend rate per share was \$4.75 and the total amount paid to shareholders was \$11,727,674.00. On those 25 same dates the rate paid on shares owned by residents of the state of Wisconsin would be the same as I have heretofore testified. The number of shares owned by Wisconsin residents on the five record dates for dividends which I have enumerated are as follows: December 31, 1935, 32918; March 31, 1936, 33086; June 30, 1936, 33760; September 30, 1936, 34097; December 15, 1936, 28031.

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On December 31, 1935 there were outstanding a total number of shares of 2,468,984 and the percentage of shares held by Wisconsin residents on that date was 1.33%. On March 31, 1936 the total number of shares outstanding was 2,468,984 and the percentage of shares held by Wisconsin residents was 1.34%. On June 30, 1936 the total number of shares outstanding was 2,468,984 and the percentage of shares held by Wisconsin residents was 1.36%. On September 30, 1936 there was a total of 2,468,984 shares outstanding and the percentage of shares held by Wisconsin residents was 1.38%. On December 15, 1936 the total number of shares outstanding was 2,468,984 and the percentage of shares held by Wisconsin residents was 1.13%.

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The actual payment of these dividends was effected by the executive officers of the company at New York City, who caused checks to be drawn on the accounts of the company in its New York banks payable to the stockholders of record upon each dividend record date. Such checks were placed in envelopes addressed to each stockholder at his address as the same appeared from the records of the company. Upon the date of payment of such dividends such checks were mailed from the postoffice in New York City. No act in connection with the declaration of the payment of such dividends was performed inside the state of Wisconsin. No act in connection with the receipt of such dividends was performed within the state of Wisconsin except the receipt by the

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small percentage of stockholders that I have testified to who resided within the State of Wisconsin and who received their checks at their residences by mail from New York City.

27 Over 96% of the stockholders reside outside of Wisconsin. Some of the figures which I have given differ slightly from the figures shown in Exhibit B which was attached to our application for hearing and that is accounted for by the fact that certain slight errors were discovered on a recheck and they are corrected by my statement here as of today.

I also have a table showing the total amounts received by Wisconsin residents on payment of the dividends on the dates that I have testified to. The total amount of dividends received by Wisconsin residents on the payment of the December 31, 1935 dividend was \$74,065.50; on the March 31, 1936 dividend \$24,814.50; on the June 30, 1936 dividend \$25,320.00; on the September 30, 1936 dividend \$34,097.00, and on the December 15, 1936 dividend \$133,147.25.

29 I have also computed the portion of the amounts of these dividends received by Wisconsin residents allocable to Wisconsin earnings, on the basis of the Wisconsin Tax Commission's computation, using the percentages that the Tax Commission used in reaching the assessment, and those amounts are as follows: \$2,599.40 of the December 31, 1935 dividend; \$956.80 of the March 31, 1936 dividend; \$976.29 of the June 30, 1936 divi-

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dend; \$1,314.71 of the September 30, 1936 dividend; and \$5,133.89 of the December 15, 1936 dividend. I have also made a computation of the amount of tax if it were limited to the last given figures. However, I have used the percentages of 2.5641% that is now conceded to be excessive and the figures that I have would be slightly less if computed on the 2.5% basis. On the basis of the 2.5641% figure, the total tax on the dividends received by Wisconsin stockholders would be \$281.56.

31

The J. C. Penney Company has no executive office of any kind located within the state of Wisconsin. Its sole business in the state of Wisconsin consists of the operation of stores as shown on the list which I have heretofore certified. Each local store is managed by a local store manager who performs no executive function in connection with the general function of the business. He does buying for his store but does not pay for the merchandise. I have made an excerpt from the certificate of incorporation of J. C. Penney Company regarding the rights of stockholders, from the articles of incorporation of J. C. Penney Company. Article 9 of the certificate of incorporation of J. C. Penney Company as it existed on December 1, 1935, provided in part as follows:

"The holders of the common stock of this corporation shall be entitled (subject to the rights of holders of preferred stock) to receive all dividends, whether stock or

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cash, declared and distributed out of the surplus or net profits earned by the corporation."

During 1935 the preferred stock of the company was called for retirement so that actually at the end of 1935 no preferred stock was in existence, and the articles of incorporation were amended 32 by striking out the words "subject to the rights of the holders of preferred stock". At present the common stockholders are the only persons entitled to participate in dividends. At the end of the calendar year 1934 J. C. Penney Company had a surplus over and above its liabilities and capital stock account of \$29,279,543.14; at the end of the calendar year 1935 it had a surplus of \$36,072,252.54; at the end of the year 1936 it had a surplus of \$37,095,176.77.

We have a standard form of resolution that we use in declaring dividends. The form of each of these dividend resolutions is as follows:

"Resolved, that the board of directors of J. C. Penney Company does hereby declare from the surplus of the company a dividend for the quarter ending blank date of blank amount per share on the common stock of the company outstanding at the close of business on the blank day of blank month."

33 (Discussion between Counsel and Commission
re Articles of Incorporation.)

"Mr. Ela: Now, Mr. Best, we do want to include in our proofs here a part of the Delaware corporation law pertaining to declaring and paying of dividends. Mr. Pell is more familiar with that. He has brought with him a copy of the Delaware corporation law, annotated, 1937, as issued by the Corporation Trust Company of New York, but if you wish, we can of course, bring down the librarian with the copy of the statutes. I trust you will be willing to accept this.

"Mr. Best: I have no objection to the form of the offer. May I ask the purpose of it, however.

"Mr. Ela: Just to complete this record on questions that may arise. We are here obviously building a record for the questions that may develop. They are the background of the whole issue of constitutionality and it is just one more element that may be involved.

"Mr. Best: I note that the section which you propose to have incorporated in the record relates to the priority of surplus and net profits as a source for the payment of dividends.

(Discussion off the record.)

"Mr. Pell: We are not accepting the theory of the law that these dividends were paid out of these particular profits, Mr. Best. I mean, if the law is valid we accept

35

your computation because that is what the law says to do. But on the other hand, we don't accept the conclusion that these dividends were actually paid out of these particular earnings.

"Mr. Best: You propose to show another source for those dividends?

"Mr. Pell: We have only put in evidence the fact that the Penney Company resolutions state they are paid out of the surplus of the company. We have already put in evidence the surplus figures of the company as of the years 1934, 1935 and 1936.

"Mr. Best: Do you propose to show what percentage of that surplus resulted from Wisconsin income?

"Mr. Pell: No, we don't; but what we propose to argue before the Court is the surplus completely loses its identity and nobody on earth could tell what proportion of these dividends were paid out of Wisconsin earnings. It is a matter of argument and for that reason we want to put in this provision which permits the payment of dividends out of surplus or what you call assets in excess of capital.

"Mr. Best: I have no objection to the introduction of the provision from the Delaware corporation law. May I suggest that in order to avoid putting lengthy volumes in evidence here, that the particular section be copied by the reporter from the volumes

which you have before you, subject to verification and comparison with the Delaware statutes.

"Mr. Pell: This is issued under the official certificate of the Secretary of State by the Corporation Trust Company, who you know very well probably, if you use them as much as we do.

36

"Mr. Ela: Do you want to follow that, perhaps, for the purpose of the record? We are now offering a part of Section 34, dividends, reserves. 'The directors of every corporation created under this chapter subject to any restrictions contained in its certificate of incorporation shall have power to declare and pay dividends upon the shares of its capital stock, either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year.'"

(Exhibit 8—application for hearing and objection to assessment—offered in evidence.)

37

Exhibits 5, 6, 7 and 8 received in evidence. The reservation of right to object to Exhibits 1-4, on behalf of the taxpayer, was withdrawn (see R. 47).

Cross Examination.

- 38 Each of the stores in Wisconsin had a bank account out of which the local pay roll and rents and local advertising expenditures are paid. I can't state the approximate total of balances in the Wisconsin accounts during the years in question but each store might keep a few thousand dollars. That would, of course, depend on the size of the business and on the time of the year which would be controlled by the amount of business. The transfers from the local accounts to the regional accounts are made by the local managers under instructions of the treasurer of the company. They have a blanket instruction that when the accounts get to a point where it is not needed locally then it shall go into the regional bank. In 1936 there was a regional bank account in Milwaukee and there was at least some attempt to maintain the balance at a certain figure in that account. I have no knowledge of what the minimum requirements might be at that bank but it probably would be around \$50,000.00 I don't happen to know the balance required by the regional banks. The regional bank accounts are drawn upon by the treasurer's office in New York. The money is transferred to the New York bank accounts out of which general salaries, overhead, taxes and merchandise purchases are paid.
- 40 All taxes except the taxes paid locally by the stores are paid out of New York. Local property

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taxes are paid by the stores out of their own bank accounts. Wisconsin income taxes, for example, are paid out of New York bank accounts. J. C. Penney Company is licensed to do business in Wisconsin and has filed Wisconsin income tax returns and paid Wisconsin income taxes for the years 1934, 1935 and 1936. The Wisconsin income which was reported for taxation on those returns was on a separate accounting basis. I can't say without referring to the return whether in making the separate accounting Wisconsin income taxes were deducted. If it is deductible by the

41 state then it probably was taken. Deductions were taken in computing the Wisconsin taxable income for the cost of merchandise sold by the Wisconsin stores. Deductions were taken for a proportion of the general salaries and overhead of the New York organization which was pro-rated through all the stores, and a portion was taken as a deduction in Wisconsin. The J. C. Penney Company does not have regional offices. It has what we call a very limited number of district offices, but they merely have a district manager who is more or less a supervising manager for a given number of stores. We do not have any district office in Wisconsin nor did we have any such in the years 1934, 1935 and 1936. There is a district manager who exercises supervision over the store manager. The district manager has no organization under him nor office staff. He may have an office stenographer. I think that Minneapolis was the district office which had the supervision over Wisconsin stores in 1934, 1935 and 1936, although I do not know

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that definitely. The surplus account of the J. C. Penney Company about which I testified is built up from the profits of the various stores throughout the chain and is built up over a period of years. This began back of 1924. J. C. Penney Company was previously incorporated under the laws of the state of Utah in 1916. The present taxpayer, J. C. Penney Company, was organized December 15, 1924 and that corporation acquired the assets and assumed the liabilities of the Utah 43 corporation of the same name. That Utah corporation operated stores in the state of Wisconsin. I would say that the income from the Wisconsin stores which had been operated by both the Utah corporation and the Delaware corporation, which were taken into surplus account of the corporation which operated the stores, in part accounts for the surplus balance which I have read into the record. I don't know what part of it would have been applicable to the operation of stores in former years when we were a Utah corporation and when we had a separate classification of stock for every store. At that time any surplus belonged to that particular store. There was a segregation on our books and that was wiped out in 1924 when we became a Delaware corporation. In 1924 when we became a Delaware corporation any surplus which stood on the books to the credit of the Wisconsin stores was transferred from the Utah company to the other company and that transfer of the surplus from the Utah company to the Delaware corporation included the transfer of the surplus which previously had been segregated as being applicable to the Wisconsin stores.

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44 I don't know what proportion of that surplus was attributable to the income of these Wisconsin stores and have never made any calculations on the same. I am certain that would be a rather Herculean task to attempt. I could not say whether the percentage was more or less than the percentages of the dividend which was computed by the Tax Commission as being payable out of Wisconsin income. The Tax Commission has used a certain basis of factors for arriving at those percentages and I don't know whether those percentages would be the same throughout the chain. They would vary from state to state; therefore they would be entirely different. I can't say whether the proportion of the surplus which resulted from the income from these Wisconsin stores was more or less than 3% or more or less than 4%.

46 *COPY OF LETTER* by Attorneys for Appellant to Wisconsin Tax Commission, Withdrawing Objections to Exhibits 1 to 4.

(Omitted.)

47-51 *ORIGINAL* of Above Letter.

(Omitted.)

52-54 *DECISION* of Wisconsin Tax Commission (the decision of the Wisconsin Tax Commission is attached as an exhibit to the notice of appeal. R. 124, 125, C. 19-21, and is consequently omitted at this portion of the case.)

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55-58 *LETTER* of Wisconsin Tax Commission and
Return Receipt to Appellant, Enclosing Decision
of Wisconsin Tax Commission.

(Omitted.)

59-64 *EXHIBIT 1*, Partial Stipulation of Facts on
Application for Hearing on Objections to Assess-
ment:

(Title omitted.)

59 *WHEREAS*, the above entitled matter is pend-
ing before the Wisconsin Tax Commission upon
the application of J. C. Penney Company for hear-
ing on objections to assessment dated July 16,
1937, and whereas it appears that certain of the
facts in connection with the matter as set forth
in the application for hearing and objections are
not in dispute and that certain facts can be stipu-
lated, which will result in simplifying the proofs
to be offered in the above captioned matter;

NOW, THEREFORE, it is hereby stipulated
by and between Wisconsin Tax Commission and
the J. C. Penney Company, by their respective
attorneys, as follows:

1. That on July 17, 1937 the said J. C. Penney
Company received notice of additional assessment
of privilege dividend tax in the principal amount
of Twenty-two Thousand Six Hundred Ninety-
six and 37/100 (\$22,696.37) Dollars, together with
interest and penalties which notice was dated July

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- 16, 1937, and was from the Wisconsin Tax Commission. That the said assessment by the Wisconsin Tax Commission is identified in a letter to the J. C. Penney Company from the Wisconsin Tax Commission dated March 31, 1937, and that a copy of the identifying statement of said assessment as included in said letter is attached hereto, marked Exhibit "A."
- 60.
2. That the time for filing objections to the assessment and application for hearing was duly extended by the Wisconsin Tax Commission to August 26, 1937, and that the application herein was filed on or before that time.
 3. That the J. C. Penney Company is a corporation organized and existing under the laws of the State of Delaware, and pays franchise tax to it. That the said J. C. Penney Company is also licensed to do business in the State of Wisconsin as a foreign corporation. That the J. C. Penney Company paid an income tax to the State of Wisconsin for the years 1934, 1935 and 1936.
 4. That the J. C. Penney Company is and during the years 1934, 1935, 1936 and 1937 was engaged in the business of operating a nationwide chain of retail department stores.
 5. That the said J. C. Penney Company has a statutory office in Wilmington, Delaware, as required by the laws of Delaware. That its principal office for the transaction of business is at

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330 West 34th Street, New York City. That all of the stock books, minute books, and secretary's records of the J. C. Penney Company are kept within the State of New York. That all transfers of stock of the company are made in New York by the Chemical Bank & Trust Company as transfer agent. That all directors, stockholders and other official meetings of J. C. Penney Company are held in the State of New York. That at directors' meetings held in the principal offices of the company at 330 West 34th Street, New York City, the following dividends were declared payable:

Date Paid	Total Amount Paid to Stockholders	Amount per Share
12/31/35	\$ 5,555,214.00	\$2.25
3/31/35	1,851,738.00	.75
6/30/36	1,851,738.00	.75
9/30/36	2,468,984.00	1.00
12/15/36	11,727,674.00	4.75

61 6. That the actual payment of said dividends was effected by the executive officers of the company who caused checks to be drawn upon the accounts of the company in its New York banks payable to the stockholders of record upon each dividend record date. That such checks were placed in envelopes addressed to each stockholder at his address as the same appeared from the records of the company upon the date of payment of such dividend.

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IT IS EXPRESSLY STIPULATED AND AGREED that the facts herein set forth shall be accepted as proven, and that additional and supplementary proofs may be made at the time set for hearing on the application for hearing on objections to assessments.

Dated this 6 day of April, A. D., 1938.

WISCONSIN TAX COMMISSION

By John S. Best,
Its Attorney.

J. C. PENNEY COMPANY

By Ela, Christianson & Ela,
Its Attorneys.

62 **Exhibit A—Folded Insert.**

65-74 **EXHIBIT 2, Various Letters Re Information Requested by Wisconsin Tax Commission.**

65. **REQUEST FOR INFORMATION** by Wisconsin Tax Commission to Appellant, Dated March 2, 1937.

(Omitted.)

66-69 **LETTER FROM APPELLANT**, Dated March 16, 1937, to Wisconsin Tax Commission, in Response to Request for Information, Together with Enclosures.

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EXHIBIT "A"

J. C. PENNEY COMPANY

Date of Payment	12-31-35	3-31-36	6-30-36	9-30-36	12-15-36	Total Additional
Amount of Dividend	\$ 5,555,214.00	\$ 1,851,738.00	\$ 1,851,738.00	\$ 2,468,984.00	\$ 11,727,674.00	
Percent paid from Wisconsin Income	3.5096	3.8558	3.8558	3.8558	3.8558	
Taxable Dividend	\$ 194,965.79	\$ 71,399.31	\$ 71,399.31	\$ 95,199.09	\$ 452,195.65	
Rate of Tax	.025641	.025641	.025641	.025641	.025641	
Privilege Dividend Tax	\$ 4,999.12	\$ 1,850.75	\$ 1,830.75	\$ 2,441.00	\$ 11,594.75	\$ 22,696.37
Penalty & Int. to 4/30/37	474.92	146.46	119.00	122.05	405.81	1,268.24
Total Additional	\$ 5,474.04	\$ 1,977.21	\$ 1,949.75	\$ 2,563.05	\$ 12,000.56	\$ 23,964.61

	1934	1935
Wisconsin Taxable Income	562,331.00 — 3.5096%	587,001.00 — 3.8558%
Total Income	16,022,607.00	15,223,478.00

	1934	1935
Book Income	\$16,024,334.14	\$15,252,675.67
Increase-Reserve for U. S. taxes	61,418.55	127,654.20
Increase-Reserve for Fire Losses	116,362.57	87,488.97
Taxes adjusted through Surplus	56,670.75	30,964.69
Total Income computed on a Wisconsin tax basis	\$16,022,607.41	\$15,223,478.13

Note: Italicized figures indicate red.

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- 70 REGISTERED RETURN RECEIPT Showing Receipt by Appellant of Letter Dated March 31, 1937.

(Omitted.)

- 71 LETTER Dated March 31, 1937, from Wisconsin Tax Commission to Appellant, Enclosing Computation of Alleged Tax on Dividends from December 31, 1935 to December 15, 1936:

March 31, 1937

J. C. Penney Company
330 W. 34th Street
New York City

In re: 99-10821

Gentlemen:

We are enclosing a schedule which shows our computation of privilege dividend tax due upon dividends declared and paid by your company between September 26, 1935 and December 31, 1936. This schedule also shows our computation of the amount of each dividend which was paid from income earned within the State of Wisconsin.

The Wisconsin privilege dividend tax Statute provides that the tax shall be computed at the rate of 2.5%. It further provides that the amount of such tax shall be deducted from the dividend paid. In case that the tax is not so deducted, the amount of tax, in itself, constitutes a further dividend which is also subject to tax. In the latter case,

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the tax computed is at the rate of 2.5641% rather than 2.5%.

Interest on the additional taxes shown on this schedule has been computed to April 30, 1937, and payment should be made before that time in order to prevent the accumulation of further interest. You will receive no further statement from us for these taxes before April 30.

For your information, we are enclosing herewith, two of our forms 4D that may be used in reporting future dividends payments. You will find the Wisconsin privilege dividend tax Statute printed upon the reverse side of these forms.

Very truly yours,

WISCONSIN TAX COMMISSION
Income Tax Division

By: L. F. DUGAN
Auditor

LFD:mib

72 . SCHEDULE SHOWING COMPUTATION
by Wisconsin Tax Commission of Additional Tax,
Enclosed in Letter to Appellant from Tax Com-
mission dated March 31, 1937 (an exact copy of
this schedule is attached as Exhibit "A" to Ex-
hibit 1 at R. 62, Folded Insert at C. 46, and is
consequently omitted at this portion of the case).

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73-74 LETTER of July 16, 1937, from Wisconsin
Tax Commission to Appellant, Assessing Addi-
tional Privilege Dividend Tax, and Return Re-
ceipt:

(Return Receipt omitted.)

July 16, 1937

J. C. Penney Company,
330 West 34th Street,
New York, N. Y.

In Re: 99-10821

Gentlemen:

Chapter 233, Laws of 1937, effective June 15, 1937, adds a new subsection to the privilege dividend tax law, making applicable to that tax the provisions of the normal income tax law with regard to additional assessments, review of assessments, refunds, credits and collections.

Pursuant to the privilege dividend tax law as thus amended, you are hereby notified of an additional assessment of privilege dividend tax in the principal amount of \$22,696.37. The computation of this tax was explained in our letter of March 31, 1937, which also showed the amount of penalty and interest to April 30, 1937. In addition to the amounts set forth in that letter the principal amount of the tax is subject to interest at the rate of one-half of one per cent per month from April 30, 1937, until paid.

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If you desire a hearing in this matter, it will be necessary for you to apply therefor in writing stating definitely and in detail your objections to the assessment. Such application must be filed in duplicate within twenty days from the receipt of this notice.

If a hearing is applied for, you may, under Section 71.10 (6) (a) of the Statutes, elect to deposit with the State Treasurer the total amount of the additional taxes set forth above together with interest thereon to the first day of the month succeeding the application for hearing. Your election to so deposit these taxes must be expressed in your application for hearing.

If no request for hearing is made within the time specified above, this assessment will become final and conclusive.

Yours very truly,

WISCONSIN TAX COMMISSION
Income Tax Division

By:

R. F. Kamm, Auditor

RFK:W

Registered Mail

Return Receipt Requested

75-77 EXHIBIT 3, Telegrams Re Extension of Time
for Filing Application for Hearing on Additional
Assessment.

(Omitted.)

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EXHIBIT 5

**NUMBER OF STOCKHOLDERS OF J. C. PENNEY
COMPANY ACCORDING TO STATES**

State	As at 12-20-35	As at 3-20-36	As at 6-20-36	As at 9-18-36	As at 12-4-36
Alabama	38	38	39	39	40
Arizona	87	85	87	88	84
Arkansas	28	28	28	29	28
California	994	965	963	994	957
Colorado	168	188	191	193	212
Connecticut	183	195	199	201	210
Delaware	25	27	27	27	28
Florida	67	77	79	80	89
Georgia	81	88	89	90	97
Idaho	109	105	107	108	104
Illinois	595	625	637	644	672
Indiana	211	213	217	220	222
Iowa	228	226	230	253	228
Kansas	187	180	182	184	175
Kentucky	78	89	90	91	102
Louisiana	33	36	38	37	39
Maine	50	27	27	27	25
Maryland	96	98	98	99	98
Massachusetts	1153	1208	1231	1244	1292
Michigan	588	363	390	395	389
Minnesota	273	279	284	287	292
Mississippi	45	48	44	44	44
Missouri	505	545	555	561	595
Montana	117	115	118	119	117
Nebraska	145	145	147	149	146
Nevada	31	32	32	33	35
New Hampshire	56	65	66	67	76
New Jersey	317	334	345	346	365
New Mexico	31	33	34	34	34
New York	2696	2771	2827	2655	2911
North Carolina	107	105	107	108	104
North Dakota	122	118	116	110	112
Ohio	410	419	427	431	438
Oklahoma	110	113	115	116	117
Oregon	337	334	340	344	337
Pennsylvania	657	695	708	715	749
Rhode Island	89	95	97	98	103
South Carolina	33	33	34	34	34
South Dakota	100	96	98	99	93
Tennessee	58	58	57	57	54
Texas	208	206	209	212	208
Utah	177	188	192	193	202
Vermont	19	20	21	21	22
Virginia	58	62	63	64	68
Washington	265	266	271	275	272
West Virginia	46	44	45	46	44
Wisconsin	391	393	397	403	406
Wyoming	31	29	30	30	29
District of Columbia	110	114	116	118	119
Others-Foreign	62	63	65	65	68
TOTALS	12385	12687	12927	13066	15281

EXHIBIT 6

Number of Stores Operated in Various
States as at End of

State	1936	1935	1934
Alabama	9	8	8
Arizona	18	16	18
Arkansas	14	14	15
California	123	122	122
Colorado	51	50	50
Connecticut	6	5	5
Delaware	1	1	1
Florida	11	11	11
Georgia	17	17	16
Idaho	29	29	29
Illinois	42	42	40
Indiana	51	51	51
Iowa	67	67	67
Kansas	79	79	79
Kentucky	21	21	21
Louisiana	8	8	8
Maine	7	7	7
Maryland	5	4	4
Massachusetts	10	9	9
Michigan	46	46	46
Minnesota	60	59	59
Mississippi	15	14	14
Missouri	45	45	44
Montana	38	38	38
Nebraska	54	54	54
Nevada	9	10	10
New Hampshire	2	2	2
New Jersey	5	5	5
New Mexico	16	16	16
New York	28	28	28
North Carolina	26	26	26
North Dakota	84	34	34
Ohio	56	54	53
Oklahoma	49	49	49
Oregon	39	39	39
Pennsylvania	52	52	52
Rhode Island	1	1	1
South Carolina	12	12	12
South Dakota	28	28	29
Tennessee	20	20	19
Texas	104	98	98
Utah	29	29	29
Vermont	4	4	4
Virginia	12	12	11
Washington	64	64	64
West Virginia	10	10	9
Wisconsin	48	48	47
Wyoming	21	21	21
TOTALS	1496	1481	1474

EXHIBIT 7

Locations of Stores Operated within
Wisconsin

Store No.	Location
264	Antigo
342	Appleton
606	Ashland
885	Baraboo
293	Beaver Dam
654	Beloit
453	Berlin
753	Boscobel
140	Chippewa Falls
1221	Clintonville
1291	Columbus
1018	Eau Claire
225	Fond du Lac
1466	Fort Atkinson
658	Green Bay
930	Hartford
324	Janesville
1446	Kenosha
1450	La Crosse
1311	Ladysmith
401	Manitowoc
1251	Marinette
261	Marshfield
1103	Milwaukee
1253	Milwaukee
1418	Milwaukee
726	Monroe
1320	New Richmond
289	Oshkosh
1051	Plymouth
423	Portage
674	Racine
765	Reedsburg
761	Rhineland
130	Rice Lake
436	Richland Center
1328	River Falls
1268	Shawano
494	Sheboygan
884	Sparta
1446	Spooner
498	Stevens Point
98	Watertown
1063	Waupun
92	Wausau
1025	West Allis
1060	West Bend
292	Wisconsin Rapids.

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78-82 **EXHIBIT 4**, Letter Acknowledging Receipt of Notice of Appeal and Letter from Wisconsin Tax Commission Fixing Date for Hearing, and Return Receipt.

(Omitted.)

83-84 **Exhibit 5—Folded Insert.**

85 **Exhibit 6—Folded Insert.**

86-87 **Exhibit 7—Folded Insert.**

88-103 **EXHIBIT 8**, Letter Enclosing Application for Hearing and Objections to Assessment, to Wisconsin Tax Commission.

(Letter Omitted.)

90 **APPLICATION FOR HEARING and Objections to Assessment Dated July 16, 1937:**

(Caption and verification omitted.)

J. C. PENNEY COMPANY in making this application for hearing and objection to assessment sets forth the following:

(1) That on July 17, 1937 it received a notice of additional assessment of privilege dividend tax

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in the principal amount of \$2,696.37, together with interest and penalties of \$1,495.20, making a total of \$24,191.57, dated July 16, 1937, pursuant to Chapter 233 of the Wisconsin Laws of 1937. That said assessment is itemized in a letter to J. C. Penney Company from the Wisconsin Tax Commission dated March 31, 1937 which is referred to in said notice of additional assessment dated July 16, 1937. That a copy of the itemized statement of said assessment as included in said letter is annexed hereto as Exhibit "A." That apparently the difference between the total amounts due as noted in said itemized statement as \$23,964.61 and \$24,191.57 as noted in said notice of additional assessment is due to the fact that interest has been added for the months of May and June at the rate of $\frac{1}{2}$ of 1% per month on \$22,696.37, amounting to \$226.96.

91

That the twenty day period for filing objections to the assessment and application for a hearing was duly extended to August 26, 1937 by the Wisconsin Tax Commission.

That J. C. Penney Company is a corporation existing under the laws of the State of Delaware and pays a franchise tax to it. It is also licensed to do business in the State of Wisconsin. That J. C. Penney Company paid an income tax to the State of Wisconsin for the years 1934, 1935 and 1936. That J. C. Penney Company paid a franchise tax to the State of New York for the privilege of doing business there for the same years.

That J. C. Penney Company is and during 1934, 1935, 1936, and 1937, was engaged in the

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business of operating a nation-wide chain of retail department stores. That the number of such stores fluctuates from time to time but that at the end of 1934 said company was operating 1474 stores; at the end of 1935, 1481; at the end of 1936, 1496; and is at present operating 1519. That during 1934, 1935 and 1936 and at the time all of the dividends here in question were paid J. C. Penney Company was operating 48 stores in the State of Wisconsin. That J. C. Penney Company is now operating 50 stores in the State of Wisconsin.

That J. C. Penney Company has a statutory office in Wilmington, Delaware, as required by the laws of the State of Delaware. That its principal office for the transaction of business is at No. 330 West 34th Street, New York City. That the total proceeds from sales of goods in Wisconsin stores and in stores in all other States are deposited in local banks. From such accounts, payments are made for payrolls, rents, advertising and other local expenses. The remainder is transmitted to the Company at New York City, and deposited to the general credit of J. C. Penney Company in New York banks where it immediately loses its identity as money derived from any particular source. Funds so deposited to the credit of the Company in New York are used to pay salaries, general overhead expenses of the New York and other offices, taxes and dividends. Checks are likewise drawn upon these accounts of the Company in payment for merchandise purchased from all sources and shipped to all stores of the Company, including those in Wisconsin. That all of

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the stock books, minute books, and secretary's records of J. C. Penney Company are kept within the State of New York. All transfers of shares of the Company are made in New York by the Chemical Bank & Trust Company. That all directors, stockholders and other official meetings of J. C. Penney Company are held in the State of New York. That at directors' meetings held in the principal offices of the Company at 330 West 34th Street, New York City, the following dividends were declared payable:

Dates Paid	Total Amount Paid to Shareholders	Amount per Share
12/31/35	\$ 5,555,214.00	\$2.25
3/31/36	1,851,738.00	.75
6/30/36	1,851,738.00	.75
9/30/36	2,468,984.00	1.00
12/15/36	11,727,674.00	4.75

That the actual payment of said dividends was effected by the executive officers of the Company who caused checks to be drawn upon the accounts of the Company in its New York banks payable to the stockholders of record upon each dividend record date. That such checks were placed in envelopes addressed to each stockholder at his address as the same appeared from the records of the Company upon the date of payment of such dividend. That all of the books and records of the company necessary in the payment of such dividends are situated in the State of New York.

- 93 That no act in connection with the payment of

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said dividends was performed inside of the State of Wisconsin and no act in connection with receipt of said dividends was performed within said State except that certain of the stockholders of the Company reside within the State of Wisconsin and received their checks by mail.

That there is attached hereto as Exhibit "B" a statement setting forth the total number of stockholders of J. C. Penney Company upon each of the dividend dates in question. Said statement shows the approximate number of stockholders of the Company residing in each State of the United States and also the number residing in the District of Columbia and foreign countries upon each of said dividend payment dates. That on the record dates for payment of the dividends noted below persons residing and having a mail address in the State of Wisconsin held the numbers of shares of stock and received the dividends noted below:

Date	Shares	Dividend per sh.
12/31/35	32,918	\$2.25
3/31/36	33,086	.75
6/30/36	33,760	.75
9/30/36	34,097	1.00
12/25/36	28,031	4.75

That the following table shows (1) total amounts received by Wisconsin residents on the payment of the above dividends; (2) the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings; (this is calcu-

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lated by the use of the percentages used by the Tax Commission in reaching its assessment. See Exhibit A); (3) the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings.

94 Dividend

Date	(1)	(2)	(3)
12/31/35	\$74,065.50 x .035096	\$2,599.40 x .025641	\$66.65
3/31/36	24,814.50 x .038558	956.80 x "	24.53
6/30/36	25,320.00 x "	976.29 x "	25.03
9/30/36	34,097.00 x "	1,314.71 x "	33.71
12/15/36	133,147.25 x "	5,133.89 x "	131.64
		Total	\$281.56

Penalties and interest on the above taxes are as follows: (figured to April 30, 1937)

Tax	Penalty and Interest	Total
\$66.65	\$6.33	\$72.98
24.53	1.96	26.19
25.03	1.61	26.64
33.71	1.69	35.40
131.65	4.61	136.25
	Total	\$297.76

(Additional interest for May and June,
1937 — 2.82

That the total amount therefore of said assessment of taxes, penalties and interest based upon dividends paid in the State of Wisconsin is \$300.58; that \$23,809.99 of said assessment represents the tax, penalty and interest on dividends received outside of Wisconsin by persons residing outside of the State of Wisconsin.

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That compliance with the Income Privilege Dividend Tax would require an extra or additional calculation or operation on the part of each employee participating in the determination of the amount of dividends payable to each stockholder of record, and in the issuance of the checks therefor, since the deduction of the amount of the tax would necessarily increase the work to that extent. That while it is impossible to itemize the cost of such compliance, it is apparent that considerable extra expense would be entailed.

95. 3. That J. C. Penney Company sets forth the following specific reasons for its objections that Paragraph 3 of Chapter 505 of the Wisconsin Laws of 1935 under which this tax is imposed, is unconstitutional:

(a) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Wisconsin Constitution and deprives J. C. Penney Company and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin except the receipt of such dividends as were paid to Wisconsin stockholders. Furthermore, the funds from which said dividends were paid

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cannot be said to be Wisconsin funds but are general funds of the Company deposited in a New York bank and derived from remittances from stores in all of the 48 states and general deposits by the New York office of the Company.

That the State of Wisconsin further has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the State of Delaware and/or the laws of the State of New York.

96

That even if said tax might be held to be constitutional from a jurisdictional standpoint in so far as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the State and/or as to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section I of the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1, of the Wisconsin Constitution since it would be a denial of the equal protection of the laws to residents of Wisconsin and Wisconsin corporations would not be uniform and would contain unreasonable exemptions.

That the tax is on the *payment and receipt* of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists the whole assessment is invalid.

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That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, under which this tax is assessed, that the Legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the State. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the Legislature would not have passed it in so limited a form. Consequently, the entire law is ineffective notwithstanding the provisions of Section 4 of Chapter 505 of the Wisconsin Session Laws of 1935.

97

That even if the tax might be held to be valid in so far as it levies a tax on dividends paid to and received by Wisconsin residents within the State, it is invalid in so far as it purports to levy a tax on dividends paid and received outside of Wisconsin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin and consequently said State has no jurisdiction to levy an excise tax. That \$23,890.99 of said assessment represents taxes, penalties and interest levied upon the payment of such dividends. This argument is presented as an alternative and is not to be construed as an admission that the law is valid in so far as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position here taken that the whole tax is invalid.

(b) That said tax is further unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 9, of the Constitution of the State of Wisconsin because it is a direct tax upon the J. C. Penney Company stock. The State of Wisconsin has no jurisdiction to tax said stock in so far as it is owned by persons not residing within the state. \$23,890.99 of this assessment was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

98

(c) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1, of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 9, of the Wisconsin Constitution and deprives J. C. Penney Company of liberty and property without due process of law in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous other acts within the State of New York. The State of Wisconsin has no jurisdiction to require J. C. Penney Company to do acts within the State of New York in order to assist it in collecting an excise or any other sort of tax.

(d) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Wisconsin Constitution, because when declared a dividend becomes

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a debt of the company. The tax is in effect a direct tax on such debt which has no taxable situs in the State of Wisconsin.

(e) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Wisconsin Constitution, because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. That annual earnings cannot be apportioned as to time and that therefore the tax is unconstitutional as to 1936 dividends as well as 1935, because it is retroactive and in effect a tax upon accumulated surplus which does not have a taxable situs in the State of Wisconsin.

(f) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article VII, Section 1, of the Wisconsin Constitution because it is an excise on the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt. Said exemption is a denial of the equal protection of the laws and unreasonable. Said tax is also not uniform.

(g) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Article 1, Section 10, of the Constit-

tution of the United States and under Article I, Section 12 of the Wisconsin Constitution because it impairs the obligation of contracts. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholder received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of Delaware, New York and Wisconsin.

(h) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Article 4, Section 1, of the Constitution of the United States because it fails to give full faith and credit to the laws of New York and Delaware and the corporate charter, by-laws and resolutions of J. C. Penney Company drawn pursuant thereto which give it the right to conduct its business and declare and pay dividends in said States.

(i) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Article 1, Section 8, of the Constitution of the United States because it interferes with the power of Congress to regulate commerce among the several States. Said law interferes with the free transmission of corporate funds from State to State.

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EXHIBIT "B"

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Record.Statement of Number of Stockholders of J. C. Penney Company
According to States

State	As at 12/20/35	As at 3/20/36	As at 6/20/36	As at 9/18/36	As at 12/4/36	As at 3/16/37	As at 6/16/37
Alabama	38	38	38	39	40	44	45
Arizona	87	85	87	88	84	98	101
Arkansas	28	28	28	29	28	32	33
California	994	965	983	994	957	1116	1149
Colorado	168	188	191	193	212	217	223
Connecticut	183	195	199	201	210	226	232
Delaware	25	27	27	27	28	31	32
Florida	67	77	79	80	89	89	92
Georgia	81	88	89	90	97	101	104
Idaho	109	105	107	108	104	122	125
Illinois	595	625	637	644	672	723	744
Indiana	211	213	217	220	222	246	254
Iowa	228	226	230	233	228	261	269
Kansas	187	180	182	184	175	207	213
Kentucky	78	89	90	91	102	103	106
Louisiana	33	36	36	37	39	41	42
Maine	30	27	27	25	25	31	32
Maryland	96	96	98	99	98	111	115
Massachusetts	1153	1208	1231	1244	1292	1397	1437
Michigan	388	383	390	395	389	443	456
Minnesota	273	279	284	287	292	323	332
Mississippi	45	43	44	44	44	50	51
Missouri	505	545	555	561	595	629	648
Montana	117	115	118	119	117	113	137
Nebraska	145	145	147	149	146	167	172
Nevada	31	32	32	33	33	37	38
New Hampshire	56	65	66	67	76	75	77
New Jersey	317	334	343	346	363	389	400
New Mexico	31	33	34	34	34	38	39
New York	2696	2771	2823	2853	2911	3203	3294
North Carolina	107	105	107	108	104	122	125
North Dakota	122	115	118	119	112	133	137
Ohio	410	419	427	431	438	484	498
Oklahoma	110	113	115	116	117	130	134
Oregon	337	334	340	344	337	386	397
Pennsylvania	657	695	708	715	749	803	826
Rhode Island	89	95	97	98	103	110	113
South Carolina	33	33	34	34	34	38	39
South Dakota	100	96	98	99	93	111	115
Tennessee	58	56	57	57	54	65	66
Texas	208	206	209	212	208	238	245
Utah	177	188	192	193	202	217	223
Vermont	19	20	21	21	22	23	24
Virginia	58	62	63	64	68	72	74
Washington	265	266	271	275	272	308	317
West Virginia	46	44	45	46	44	51	53
Wisconsin	391	393	401	405	406	455	468
Wyoming	31	29	30	30	29	34	35
District of Columbia	110	114	116	118	119	132	136
Foreign	62	63	65	65	68	73	76
TOTAL	12385	12687	12927	13066	13281	14668	15093

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**J. C. PENNEY COMPANY REQUESTS A
HEARING BEFORE THE TAX COMMISSION
UPON SAID ASSESSMENT AND RESPECT-
FULLY REQUEST THAT SAID ASSESS-
MENT BE WITHDRAWN.**

J. C. PENNEY COMPANY, INC.,
By: E. C. Sams.

Attest:

A. J. Raskopf.

101 EXHIBIT A attached to Exhibit 8, is a copy of the original computation made by the Wisconsin Tax Commission of the taxes due from the appellant, which was enclosed in letter to appellant from Wisconsin Tax Commission dated March 31, 1937, and an exact copy of this Exhibit A is attached as Exhibit A to Exhibit 1 at R. 62, at C. 46, and consequently is omitted at this portion of the case.

102-103 Exhibit B—Folded Insert.

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104-106 **EXHIBIT 9**, Letter of A. J. Raskopf, Witness at Hearing, to Attorneys for Appellant, Incorporated in record by agreement:

C
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P
Y

105

J. C. PENNEY COMPANY
Incorporated
330 West 34th Street
New York, N. Y.

May 6, 1938

Messrs. Gwinn & Pell,
522 Fifth Avenue,
New York City.

Gentlemen:

Attention of Mr. Pell.

Re: Wisconsin Privilege Dividend Tax.

We are returning the transcript of the writer's testimony of April 11 before the Wisconsin Tax Commission in connection with the above.

In going through this, we find that Mr. Best, attorney for the Commission, asked the writer in reference to the Wisconsin store Managers the question "Does he buy the merchandise for his store," to which I replied, "He does." It is just possible that this statement which I made requires

some further explanation, which we are giving in this letter.

The Managers do buy merchandise for their stores but they do not have the actual contact with the vendors of the merchandise from whom the company buys. The company has a large staff of buyers in the New York and St. Louis offices who scour the markets throughout the country in order to obtain the best possible merchandise buys. These buyers enter into contracts with the various manufacturers of the goods that they select and then send to the various stores throughout the chain price lists and descriptive circulars on the items of merchandise for which they have contracted.

The Managers then go over these price lists and determine what merchandise they require for the operation of their stores. There is no compulsion about their taking any or all of the items of merchandise presented to them in price list form by the Buying staff, but the selection of the goods is left to the judgment of the Manager as to his needs in the community in which he operates and the saleability of the goods. Therefore, it can of course be said that the Managers buy merchandise for their stores since they are obliged to make up orders for the various lines of merchandise that they desire to purchase for their store operations and the stores are charged with the cost of all goods so purchased by the Managers. In this respect our operations differ from that of some of the other organizations where, instead of giving the Manager the opportunity to

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select various items of merchandise for his store operation, goods purchased by the central buying staff is forwarded to the stores and the stores are required to do their best toward selling it.

106 Messrs. Gwinn & Pell,

May 6, 1938

The writer submits this additional statement as it may be considered advisable to have it included with his testimony before the Commission on April 11 in order that there may be no misunderstanding on this particular question as submitted by Mr. Best and as answered by the writer.

Very truly yours,

(Signed) A. J. RASKOPF
Secretary

AJR:MQ

107-108 *EXHIBIT 10*, Letter of Counsel for Wisconsin Tax Commission, Consenting to Treat Exhibit 10 as Part of the Record and Agreeing to Corrections in Record.

(Omitted.)

109-110 *ADMISSION OF SERVICE* by Wisconsin Tax Commission, on Notice of Appeal to Circuit Court.

(Omitted.)

111-126 *NOTICE OF APPEAL* by Appellant to Circuit Court (included at C. 2-21 herein).

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Record.

127-128 *ANSWER OF TAX COMMISSION* on Ap-
peal to Circuit Court (included at C. 21 here-
in).

129 *ADMISSION OF SERVICE* of Appellant
on Brief to Circuit Court.

(Omitted.)

130-174 *BRIEF* of Appellant in Circuit Court.

(Omitted.)

175-219 *BRIEF* of Wisconsin Tax Commission in
Circuit Court.

(Omitted.)

220 *STIPULATION* that Appeal in Circuit
Court Might Proceed without Further Notice.

(Omitted.)

221-222 *MEMORANDUM DECISION* by Circuit
Court for Dane County, Wisconsin and Order
Confirming Assessment of Tax Commission
and Directing Judgment:

(Title omitted.)

221 The above entitled matter comes before this
Court upon appeal taken by J. C. Penney Com-
pany, a foreign corporation, from the decision
and order of the Wisconsin Tax Commission
dated July 21, 1938.

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Record.

Briefs were filed by Gwinn & Pell of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, representing the J. C. Penney Company, appellant, and by the Attorney General of the State of Wisconsin and H. H. Persons, Esq., Assistant Attorney General, representing the respondent.

The court has considered the issues and matters raised on this appeal and which are covered in briefs filed by the respective parties, and particularly the constitutional question raised by the appellant; in view of the decision of the Supreme Court of the State of Wisconsin in the case of *State of Wis. ex rel., Froedert Grain & Malting Co., Inc. vs. Wisconsin Tax Commission*, 221 Wis. 225, and particularly in view of the decision rendered on the motion for rehearing in that case, this Court feels that it has no alternative except to hold the law under which the assessments were levied constitutional; and accordingly the said order of the Wisconsin Tax Commission affirming the assessment or assessments involved in this appeal should be confirmed.

IT IS, THEREFORE, ORDERED, that the assessment involved on this appeal by the Wisconsin Tax Commission against J. C. Penney Company, a foreign corporation, be and the same is 222 hereby confirmed, and the judgment confirming said assessment be entered herein.

AUGUST C. HOPPMANN (Copy)
Circuit Judge.

Dated, June 10, 1939.

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Record.

223

WAIVER OF NOTICE of Application for
Entry of Judgment.

(Omitted.)

224-225 **JUDGMENT** of Circuit Court for Dane
County, Wisconsin, on Appeal from Tax Com-
mission:

(Title omitted.)

At the regular March 1939 term of the
Circuit Court, begun and held in the
Court House in the City of Madison in
said county, and on the 10 day of June,
1939 of said term. Present the Hon. Au-
gust C. Hoppmann, Circuit Judge pre-
siding.

The above entitled proceeding was brought to
review an order of the Wisconsin Tax Commis-
sion dated July 21st, 1938, which said order of the
Wisconsin Tax Commission affirmed the assess-
ments and the tax imposed upon dividends de-
clared by the J. C. Penney Company, a foreign
corporation, being dividends of December 31st,
1935, March 1st, 1936, June 30th 1936, September
30th, 1936 and December 15th, 1936; the matter
coming on to be heard at said term under the pro-
visions of the Wisconsin Statutes, and particu-
larly Sec. 71.16 thereof, the appellant appearing
by Gwinn & Pell of New York City, and Ela,
Christianson & Ela of Madison, Wisconsin, its at-
torneys, and the respondent appearing by the
Attorney General and Harold H. Persons, Esq.,

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Record.

Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant J. C. Penney Company, a foreign corporation,

Now, Therefore, on the record, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

8
IT IS ADJUDGED that said order of the Wisconsin Tax Commission dated July 21st, 1938 and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant J. C. Penney Company shall pay the clerk's fee.

By the Court,

AUGUST C. HOPPMANN (Copy)
Judge.

226-228 **NOTICE OF APPEAL** to Supreme Court.
(Omitted.)

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Record.

229 **NOTICE OF DEPOSIT** in Lieu of Undertaking on Appeal.

(Omitted.)

230 **RETURN OF CLERK** of Circuit Court to Supreme Court on Appeal.

(Omitted.)

Respectfully submitted,

GWINN & PELL,
522 Fifth Avenue,
New York City.

ELA, CHRISTIANSON & ELA,
1 West Main Street,
Madison, Wisconsin.

Attorneys for Appellant.

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Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Eighth day of August, A. D. 1939.

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson, Hon. Joseph Martin, Justices. Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the fifteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the J. C. Penney Company, a foreign corporation, by its attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

STATE OF WISCONSIN, IN CIRCUIT COURT FOR DANE COUNTY

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

Circuit Court Dane County, Wis. Filed June 13, 1939,
Myrtle L. Hansen, Clerk.

NOTICE OF APPEAL

You Will Please Take Notice that J. C. Penney Company, a foreign corporation, appellant in the above proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 10th day of June, 1939, in favor of the respondent and against the appellant, confirming the order of the Wisconsin Tax Commission dated July 21st, 1938 and the assessment and tax referred to therein, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated June 13, 1939.

Gwinn & Pell & Ela, Christianson & Ela, Attorneys for Appellant.

To: John E. Martin, Esq., Atty. General of State of Wisconsin.

Harold H. Persons, Esq., Asst. Atty. General of State of Wis. Clerk of the Circuit Court for Dane County, Wisconsin.

Filed June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

IN CIRCUIT COURT FOR DANE COUNTY, STATE OF WISCONSIN

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

JUDGMENT

Circuit Court Dane County, Wis., Filed June 13, 1939.
Myrtle L. Hansen, Clerk.

At the regular March 1939 term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated July 21st, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the J. C. Penney Company, a foreign corporation, being dividends of December 31st, 1935, March 1st, 1936, June 30th, 1936, September 30th, 1936, and December 15th, 1936; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by Gwinn & Pell of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys; and the respondent appearing by the Attorney General and

Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant J. C. Penney Company, a foreign corporation,

Now, therefore, on the record, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

It Is Adjudged that said order of the Wisconsin Tax Commission dated July 21st, 1938 and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant J. C. Penney Company shall pay the clerk's fee.

By the Court,

August C. Hoppmann, Judge.

IN CIRCUIT COURT FOR DANE COUNTY, STATE OF WISCONSIN
J. C. PENNEY COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent

NOTICE OF DEPOSIT IN LIEU OF UNDERTAKING

You Will Please Take Notice that the appellant, J. C. Penney Company, a foreign corporation, pursuant to Section 274.14 of the Wisconsin Statutes of 1937, has deposited with the Clerk of the above court the sum of Two Hundred Fifty (\$250.00) Dollars, in lieu of any undertaking which would be necessary to perfect an appeal in said action.

Dated, June 13, 1939.

Gwynn & Pell and Ela, Christianson & Ela, Attorneys for Appellant.

To: John E. Martin, Esq., Atty. General of State of Wisconsin. Harold H. Persons, Esq., Asst. Atty. General of State of Wis.

Filed June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[Endorsements:] Original State of Wisconsin Circuit Court, Dane County. J. C. Penney Company, a foreign corporation, Appellant, vs. Wisconsin Tax Commission, Respondent. Notice of Appeal and Notice of Deposit in Lieu of Undertaking. Ela, Christianson & Ela 1 West Main Street Madison, Wis., Attorneys for Appellant. Due service admitted this 13th day of June, A. D. 1939. John E. Martin, Attorney General of Wisconsin, By H. H. Persons, Asst. Atty. General, attorneys for Respondent Wis. Tax Comm.

Service admitted this 13th day of June, 1939. Myrtle L. Hansen, Clerk.

Circuit Court Dane County, Wis., Filed June 13, 1939. Myrtle L. Hansen, Clerk.

Filed June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

And afterwards, to-wit: on the 6th day of November, A. D. 1939, the following stipulation was filed in this cause:

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1939

No. 96

J. C. PENNEY COMPANY, a foreign corporation, Appellant,
vs.

WISCONSIN TAX COMMISSION, Respondent.

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Appellant-Plaintiff, by its attorneys at law, and John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, as attorneys for the Wisconsin Tax Commission, Respondent, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin, that the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin, may be made

parties defendant and respondent in the above-entitled matter and that an order may be made and entered to that effect forthwith and without any further notice to any of the parties.

Dated October 30, 1939.

Gwinn & Pell; Ela, Christianson & Ela, Attorneys for Appellant-Plaintiff.

John E. Martin, Attorney General of the State of Wisconsin; Harold H. Persons, Assistant Attorney General of the State of Wisconsin, Attorneys for Respondent, Wisconsin Tax Commission, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin.

Upon the foregoing stipulation,

It Is Hereby Ordered: That the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin be and the same hereby are made defendants and respondents in the above-entitled matter.

Dated this 6th day of November, 1939.

By the Court.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin.

And afterwards to wit on the 7th day of November, A. D. 1939, the same being the 21st day of said term, the following proceedings were had in said cause in this Court:

DANE CIRCUIT COURT

J. C. PENNEY COMPANY, a foreign corporation, Appellant,
vs.

WISCONSIN TAX COMMISSION, Respondent.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by W. H. Dannat Pell, Esq., Roswell Dean Pine, Jr., Esq., and G. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit: on the 16th day of January, A. D. 1940, the same being the 4th day of said term, the

judgment of this Court was rendered in words and figures following, that is to say:

DANE CIRCUIT COURT

Opinion by Chief Justice Rosenberry

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now hereby ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment setting aside the assessment.

Justice Fowler dissents.

Thereupon the opinion of the Court by Chief Justice Rosenberry, and the dissenting opinion of Justice Fowler, were filed in words and figures following, that is to say:

Filed Jan. 16, 1940. Arthur A. McLeod, Clerk of the Supreme Court, Madison, Wis.

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1939

No. 96

J. C. PENNEY Co., a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

Appeal from a judgment of the circuit court for Dane county: August C. Hoppmann, Circuit Judge, presiding. Reversed.

J. C. Penney Company, a foreign corporation, began this action on August 23, 1938, to set aside an order of the defendant, Wisconsin Tax Commission, dated July 21,

1938. From a judgment entered on June 10, 1939, confirming the assessment, plaintiff appeals.

The facts will be stated in the opinion.

ROSENBERRY, C. J. The plaintiff is a Delaware corporation, having its statutory office at Wilmington, Delaware. It is engaged in the business of operating a nation wide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the state of Wisconsin but has no executive office of any kind located within the state. During the year 1934 it operated 47 stores in this state. In 1935 and 1936 it operated 48 stores in Wisconsin. During the year 1934, plaintiff had a total net income computed on the Wisconsin tax basis of \$16,022,607 and in 1935, a total net income of \$15,223,478. Applying the formula of the Wisconsin income tax statute (sec. 71.02), \$562,331 of the 1934 income was allocable to Wisconsin business and \$587,001 of the 1935 income was allocable to Wisconsin business. The plaintiff declared the following dividends:

On December 31, 1935, J. C. Penney Company declared a dividend of \$2.25 per share, making total dividend payments of \$5,555,214.00.

In 1936, J. C. Penney Company declared and paid the following dividends.

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36	\$.75	\$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

Pursuant to a notice of additional assessment, dated July 16, 1937, the Tax Commission assessed a privilege dividend tax which was ultimately adjusted at the sum of \$23,586.79. The plaintiff duly filed its application for hearing and made objection to the assessment within the period prescribed by law.

The plaintiff operates its business in the following manner: the total proceeds from sales of goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made,—payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the

treasurer's office in New York City and deposited in New York banks to the credit of the Company. No separate account is kept of the funds from the various states and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are drawn in payment for all merchandise purchased and shipped to the various stores. All of the stockbooks, minute books and secretary's records of the Company are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that state. All transfers of shares of stock are made by the New York transfer agent of the Company; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings. The actual payment of dividends is effected by checks drawn upon the accounts of the plaintiff Company in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders of the Company received their mail in this State. It appears from the evidence that 391 stockholders were residents of the State of Wisconsin as of the date of payment of the December 31, 1935, dividend as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 406 Wisconsin stockholders as against a total of 13,281 stockholders. If the tax had been levied upon the basis finally adopted by the Commission it would have amounted to \$274.54. The tax was levied pursuant to the provisions of sec. 3, ch. 505, Laws of 1935 as amended. This was the same as sec. 71.60 of the Laws of 1937 except the expiration date is July 1, 1937, instead of July 1, 1939. The law is as follows:

"(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this State, there is hereby imposed a tax equal to two and one-half per centum of the amount of

such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1939. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

The plaintiff contends that this law as applied to a foreign corporation doing business as plaintiff does business is invalid for the reason that it deprives the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment to the constitution of the United States and Art. VIII, sec. 1, of the constitution of the state of Wisconsin. Stated specifically it is the contention of the plaintiff that the state of Wisconsin has no jurisdiction to impose an excise tax upon a transaction which takes place beyond its borders; that all of the acts of the plaintiff com-

pany in the declaration and payment of dividends and the acts of its stockholders in receiving them outside of the state are insufficient to confer jurisdiction to tax dividends declared by a corporation organized under the laws of a sister state. As already stated only an inconsiderable part of the dividend is received through the mails by Wisconsin stockholders.

This Court had the constitutionality of sec. 3, ch. 505, Laws of 1935, as amended before it in *State ex rel. Froedtert G. & M. Co., Inc., v. Tax Comm. of Wisconsin* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52. That was an action for a declaratory judgment and was brought by a Wisconsin corporation. The Court held that the tax imposed upon the Wisconsin corporation pursuant to the provisions of sec. 3, ch. 505, was a valid tax. In that case the Court held that the language of the act "for the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)" imposed an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders.

There was a motion for a rehearing in the Froedtert case and briefs amicus curiae were filed by counsel appearing on behalf of foreign corporations. While the application of the law to foreign corporations was not before the Court upon the pleadings in the case, the Court concluded to consider the validity of the act as applied to foreign corporations and held:

"We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived; and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the Travis Case, *supra*, about imposing upon the employer liability for

the income tax on salaries of nonresidents earned within the state."

This decision of the Court is vigorously assailed. We are earnestly besought to reconsider the decision of the Froedtert case so far as it applies to foreign corporations. It is agreed on all sides that the tax in question is an excise tax and this Court so held in the Froedtert case. The Court in effect held that the tax was an excise tax "for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state" and was therefore subject to the jurisdiction of the state as are incomes and inheritances. It is apparent that upon this basis the tax imposed by subsec. (1), sec. 1 of the act can not be imposed upon dividends declared by a foreign corporation because they are not declared within this state nor is the privilege one granted by this state. To meet this objection on the motion for rehearing the Court held that a dividend declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this state because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state.

Since the decision was rendered in the Froedtert case, on May 4, 1936, the Supreme Court of the United States has considered and decided Conn. General Co. v. Johnson (1938), 303 U. S. 77. The appellant in that case was a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses if any, were payable. Sec. 14 of Art. XIII of the constitution of the state of California as supplemented by legislative enactment, lays upon every insurance company doing business within the state an annual tax of 2.6% "upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state."

It is apparent from a consideration of this provision that if reinsurance premiums are paid to companies or associations not authorized to do business within the state of Cali-

fornia, no deduction is made from the amount of the gross premium received and the amount of the gross premium becomes the measure of the tax. When, however, a part of the gross premium received and paid within the state of California is paid to a company authorized to do business in California, the amount so paid for reinsurance is deductible from the gross premium received. It would seem that where the tax was solely upon a premium earned in the state of California paid for reinsurance to another company authorized to do business in California, that it might be held California retained jurisdiction for the purposes of imposing a tax upon the reinsurance premium so paid. The Supreme Court of California pointed out that the provision for the deduction was intended to avoid double taxation without any loss of revenue to the state; that for the purpose of accomplishing that end the deduction of reinsurance premiums paid to the companies authorized to do business in the state is allowed on the theory that the burden will be passed on to the reinsurer who, being authorized to do business in the state, will be taxed on the reinsurance premiums as a means of equalizing the tax.

The Supreme Court of the United States, however, held that a reinsurance transaction which took place within the state of Connecticut, was not subject to taxation by California although the transaction dealt entirely with California business, both parties to the transaction being authorized to do business within the state of California and the entire amount of the reinsurance premium was earned in California.

The reason for the invalidity of the tax was stated by the Supreme Court of the United States in the following language:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted

to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere (Citing). It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.''

In the Froedtert case we rejected the contention that the tax was a tax on property (p. 235) and rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the transaction of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. In the Conn. General Co. case, supra, the Supreme Court of the United States made the further statement:

"Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

"The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere (Citing). Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state (Citing) and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege (Citing), there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by

that state (Citing). All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

This determination of the Supreme Court of the United States clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the Conn. General Co. case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the dividend in question. Certainly the payment of a reinsurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.

Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case. We have given the matter thorough and careful consideration because of the importance of the

question involved and the effect a ruling adverse to the defendant will have upon State finances. While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. The question here involved is one of the incidence of taxation and not whether the State has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.

We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States.

It is hardly necessary to say that the considerations which require us to hold sec. 3 of the act, sec. 71.60, Stats., to be invalid when applied to foreign corporations have no application to the declaring and receiving of dividends of a Wisconsin corporation. It has been suggested that if the section is invalid as applied to foreign corporations, it should be held invalid as a whole because of the fact that it creates a discrimination as respects tax liability between domestic and foreign corporations in this respect, Wisconsin earnings of a domestic corporation may be taxed under the section while Wisconsin earnings of a foreign corporation wholly escape taxation under the section.

Sec. 4 of the act, sec. 71.60, Stats., provides:

"If any section, subsection, paragraph, provision or part of this act, or its application to any person or circumstance shall be held unconstitutional, such decision shall not affect the constitutionality of any other section, subsection, provision or part, or its application to other persons or circumstances."

While this declaration of legislative policy is not absolutely controlling upon the court, it will not be ignored except in a case where it clearly appears that the remainder of the act is dependent on the part held invalid. The effect of the statute is merely to reverse the presumption of inseparability which ordinarily obtains and to create the opposite one of separability. Carter v. Carter Coal Co. (1935), 298 U. S. 238, 312; Mazurek v. Farmers Mutual Life Ins. Co. (1935), 320 Pa. 33, 102, A. L. R. 798.

Whatever the economic effect may be it is plain that the application of the act to Wisconsin corporations is not legally dependent on its application to foreign corporations. The legislature has declared in the most emphatic language that one may stand without the other. We discover no ground upon which it may be said the legislative declaration is not controlling in this case.

By the Court.—Judgment reversed and cause remanded with directions to enter judgment setting aside the assessment.

IN SUPREME COURT, STATE OF WISCONSIN

August Calendar, 1939 January Term, 1940

No. 96

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

v.

WISCONSIN TAX COMMISSION, Respondent.

FOWLER, J. (Dissenting.) This court held in Froedert v. Tax Commission, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, that the statute involved herein was constitutional, and the instant decision reiterates that holding as applied to Wisconsin corporations. The instant decision holds that as applied to corporations organized under the laws of sister States declaring dividends outside the State resulting from business conducted in this State the statute is unconstitutional. The instant ruling is based upon the ruling of the Supreme Court of the United States in the case of Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77. A ruling of the Supreme Court of the United States on a question under the constitution of the United States governs the

ruling of this court in a case that involves the same state of facts. But a decision in one case does not govern the decision of another unless the facts of the latter are so like those in the former as to render the reason of the former as applicable to the latter as to the former. Thus it is that the decision in the case cited does not govern the decision in the instant case if the facts of the instant case can be so differentiated as to render the reason of that case inapplicable here.

It is quite true that the Connecticut General Life Ins. Co. case rules this case if we take literally statements of the opinion in that case, quoted in the instant opinion, and apply them to the factual situation here involved. But the instant factual situation, while in some respects similar, is, as I view it, materially different in one respect from that involved in that case. It is said in the opinion in that case that "the due process clause denies to the State power to tax * * * the corporation's property and activities elsewhere." The reason for that statement is stated to be that jurisdiction of the State of California to impose the tax is "to be ascertained by reference to the incidence of the tax upon its objects." The object of the California tax was the reinsurance premium received and contracted for in the State of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the State of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. The reason not applying, neither does the rule. So at least it seems to me. Under this concept, the statute here involved remains valid unless subsequently declared invalid by the Supreme Court of the United States.

The tax here involved is laid upon the declaration of dividends upon corporate earnings within this state. It seems to me that if such a tax may be laid upon the declaration of dividends so earned by a Wisconsin corporation within the state, it may per force be laid upon the declara-

tion of dividends so earned by a foreign corporation, regardless of whether the dividends be declared within or without the state. A Wisconsin corporation conducting a business in Wisconsin at Beloit would be subject to taxation upon a declaration of dividends based upon its earnings within the state, regardless of whether the declaration were made in Beloit or across the state line in Illinois at South Beloit. The directors declaring the dividend could not escape the tax merely by crossing the state line to declare it. To permit this would be to exalt the mere mechanics of the matter over the reason of it. Nor, by the same token, as it seems to me, is it material whether the declaration of dividends based on earnings made in Wisconsin, are declared in Wisconsin or in New York or Delaware. No corporation of one state, that comes into another state and does business there in competition with corporations of that state, should be permitted to escape any taxation with which the corporations of that state with which it competes are burdened merely because it is organized under the laws of another state or because it receives or holds or handles its Wisconsin earnings in another state. To permit corporations merely by organizing in one state and going into other states to conduct their operations to escape burdens of taxation or other disadvantages to which local corporations with which they compete are subject under the laws of the state in which they operate is wrong in principle.

Some tax decisions of the Supreme Court of the United States rendered since Connecticut General Life Ins. Co. v. Johnson, *supra*, was decided, and some rendered shortly before, seem to me to show that notwithstanding what is said in the opinion in that case, the plaintiff herein has a tax situs in Wisconsin for the imposition of the instant tax.

Newark Fire Ins. Co. v. State Board, 307 U. S. 313, sustained the taxation in New Jersey of the paid up capital stock and surplus of a New Jersey corporation which kept its main office in New York and there kept its securities and the bulk of its cash. Mr. Justice Reed wrote an opinion concurred in by three other members of the court. This opinion refers to the "fiction" by which intangibles have become taxable in a jurisdiction where the corporation has acquired a "tax situs." It is said, p. 321, as the reason for recognition of such tax situs, that:

"The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a tax situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation. To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

The tax involved in that case was a property tax, but the same reason that applies to a tax situs for property taxation of intangibles applies for establishing a tax situs for the purpose of excise taxation when, as in the instant case, the thing taxed is 'definitely connected' "as an integral part of the local activity." The basis of the taxation of appellant herein is that the declaration of the dividend on which the excise tax against the corporation is based is so definitely connected as an integral part of the local activity of the taxpayer in earning the dividends on which the tax is computed as to give it a tax situs in Wisconsin.

In this case Mr. Justice Frankfurter also wrote an opinion, also concurred in by three other justices, in which it is said in respect of interference with taxation by the states:

"Wise tax policy is one thing; constitutional prohibition is quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statement. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National

Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

In *Smith v. Ajax Pipe Line Co.*, 87 F. (2d) 568, it was held that a Delaware corporation keeping its funds in a bank in New York but having its principal place of business in Missouri and keeping its books and records there had a tax situs in Missouri, and that the state of Missouri might tax its bank deposits kept in New York. Similarly in *First Bank Corporation v. Minnesota*, 301 U. S. 234, Minnesota was permitted to tax a Delaware corporation on stock in Montana and Dakota banks. It is said on p. 241 of the opinion:

"We have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government."

The reason back of the rule permitting taxation of a corporation of one state to be taxed in another state on its intangibles attributable to business in that other state is as stated in the above quotation. That reason applies just as aptly and just as strongly to uphold the excise tax here involved and upon that reason the instant tax should be upheld.

*The case of *Curry v. McCanless*, 307 U. S. 357, 83 L. Ed. 1339, bears upon the question here involved. It deals with an excise tax based on devolution of intangibles by death. A resident of Tennessee created a trust whereby securities were given to trustees residing in Alabama for purposes declared in the instrument of trust. The donor by the instrument of trust reserved to herself the right to dispose of the corpus by will. By her will she bequeathed the corpus to the trustees with direction to turn it over to residents of Alabama. Tennessee based a death tax upon the exercise by the donor of the power of appointment by will. Alabama imposed a death tax upon the trustees in Alabama. The question involved was whether both states might impose the tax and it was held that they might. That the devolution of the intangibles occurred in Tennessee, where the donor resided at her death, did not deprive the state of

Alabama from imposing a tax on that devolution. The thing that transferred the intangibles and the right to them was the will activated by the donor's death. The thing that effected the transfer occurred in one state, yet the transfer was taxable in the other. I see no more reason why the mere fact in the instant case that the devolution resulting from the declaration of the dividend occurred in New York should defeat the devolution tax imposed by Wisconsin than that the mere fact that the occurrence of the devolution in Tennessee should defeat the Alabama tax. The connection between the devolution and the Alabama's taxpayer's acquisition made the devolution to him taxable although that devolution occurred in Tennessee. By the same token the connection between the declaration of the dividend in New York and the earning of those dividends in Wisconsin made the devolution effected by the declaration of the dividend in New York taxable in Wisconsin.

In *Ford Motor Co. v. Beauchamp*, — U. S. —, decided December 11, 1920, an excise or franchise tax imposed by the state of Texas upon a foreign corporation doing business in that state and the other states of the United States was sustained. The tax was based upon the proportion of the corporation's capital employed in Texas computed on the percentage of the corporation's sales made within Texas. In the opinion of the court it is said:

"The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the State sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the State, no provision of the Federal Constitution is violated."

The statement next above quoted, down to the last sentence thereof, applies verbatim to the instant case. The last sentence may be paraphrased: "When that charge, as here," is based upon the amount of business done in Wisconsin, "no provision of the Federal Constitution is violated."

For the reasons above stated I think the judgment of the circuit court should be affirmed.

In Supreme Court, State of Wisconsin. J. C. Penney Company, a foreign corporation, Appellant, v. Wisconsin Tax Commission, Respondent.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause, in this Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 29th day of March, A. D. 1940.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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